No. 95-84

In the Supreme Court of the United States

OCTOBER TERM, 1995

CUBAN AMERICAN BAR ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the judgment of the court of appeals should be vacated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 43 F.3d 1412. The order of the district court (Pet. App. 33a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1995. A petition for rehearing was denied on April 18, 1995. See Brief for the Federal Respondents in Opp., App. at 1a-2a (No. 94-1611).[1]

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[1] On March 31, 1995, prior to the disposition of petitioners' rehearing petition, the intervenor-plaintiffs filed a petition for

The petition for a writ of certiorari was filed on July 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1994, the government of Cuba publicly announced that it would cease enforcing emigration controls. Shortly thereafter, tens of thousands of Cuban migrants took to the seas in an effort to reach the United States. See No. 94-5138, Court of Appeals Record Excerpts (R.E.) 253-257, 266-268. Most of the migrants employed vessels that "were no more than makeshift rafts." R.E. 293. Many Cuban migrants lost their lives, and the lives of thousands more were placed at risk. *Ibid.* Responding to the crisis, the President emphasized that the Cuban government would not be permitted to succeed in any attempt to dictate American immigration policy, and that the United States would do everything within its power to ensure that Cuban lives were saved and the mass outflow stopped. R.E. 257.

Before the crisis, this country's policy was to bring to the United States all Cuban migrants rescued at sea. R.E. 293. Such migrants were routinely granted parole, see 8 U.S.C. 1182(d)(5)(A), despite the irregular ways in which they may have reached this country. R.E. 270. In response to the sudden and massive outflow of Cuban migrants, however, the United States altered its policy. On August 18, 1994, the President directed that those rescued at sea be provided safe haven at facilities outside the United

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a writ of certiorari. On June 19, 1995, this Court denied that petition. See *Haitian Refugee Ctr., Inc.* v. *Christopher*, 115 S. Ct. 2578.

States, primarily at the United States naval base located at Guantanamo Bay, Cuba. R.E. 257, 293.[2] Some Cuban migrants were also afforded safe haven at United States military installations in Panama. As a result of the new policy, 32,780 Cuban migrants were provided safe haven by the United States at Guantanamo and in Panama.

On September 9, 1994, the United States reached an agreement with Cuba, seeking to "normaliz[e] migration procedures" and "to ensure that migration between the two countries is safe, legal, and orderly." R.E. 270. In order to "deter further dangerous migration from Cuba, and to provide Cubans seeking entry into the United States a safe alternative to boat departures," the United States agreed to take steps to make it less attractive for Cubans to attempt to reach the United States in an irregular manner. R.E. 294. The United States agreed to expand the provisions for the legal migration of Cubans. At least 20,000 Cubans will be authorized each year to enter the United States legally, including persons who qualify as refugees and their families, persons issued preference immigrant visas and their families,

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[2] The naval base at Guantanamo Bay is in territory of the Republic of Cuba. That base exists pursuant to a lease agreement with the Republic of Cuba. In the agreement, the parties explicitly recognize "the continuance of the ultimate sovereignty of the Republic of Cuba over those land and water areas." Agreement between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Art. II (Feb. 23, 1903); 6 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1113-1114 (1971).

and persons who are selected through a special parole program. The United States agreed to process applications under the expanded immigration provisions only from Cuban nationals in Cuba (not including those at Guantanamo). The United States also agreed, as a one-time measure, to parole into the country all eligible Cubans on the worldwide visa waiting list as of September 9, 1994, on whose behalf petitions for immigration had been filed. R.E. 270-271, 294.

The agreement also described the United States' policy decision, adopted before the conclusion of the agreement, that migrants rescued at sea will no longer be permitted to enter this country; instead, such migrants are to be taken to safe havens outside the United States. R.E. 270-271, 294. The United States and Cuba agreed "that the voluntary return of Cuban nationals who arrived in the United States or in safe havens outside the United States on or after August 19, 1994" would "continue to be arranged through diplomatic channels." R.E. 271.

2. a. The petitioners in this case include several migrant Cubans and several legal service organizations. In October 1994, petitioners filed a class action against various federal officials, seeking to bar the repatriation of Cuban migrants. Petitioners claimed, *inter alia*, that the repatriation was not voluntary because the migrants had not been provided counsel and allegedly were kept in unacceptable living conditions. They claimed that the repatriation violated the migrants' rights under the Fifth Amendment of the United States Constitution, Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, and 8 U.S.C. 1182(d)(5). The legal service organ-

izations also asserted a right to be allowed access to all of the migrant Cubans at Guantanamo.

b. Although the district court did not formally certify a class, the court entered an injunctive order granting class-wide relief. The district court barred further repatriation of any Cuban migrants and required the government to grant the plaintiff-attorneys "reasonable and meaningful access" to all of the migrants at Guantanamo. Pet. App. 44a.

c. On October 31, 1994, several Haitian migrants and the Haitian Refugee Center (HRC) sought to intervene in the lawsuit. They requested a bar on repatriation of the Haitian migrants at Guantanamo and an order mandating that HRC be afforded access to them. The district court provisionally granted intervenor status to HRC and the Haitian migrants. Nos. 94-5231 & 94-5234 (11th Cir.), R.E. 92. The court subsequently issued an order that, *inter alia*, required the government to grant counsel for HRC "reasonable and meaningful" access to all named Haitian migrants and any other Haitian requesting counsel. *Ibid.*

3. On appeal, the Eleventh Circuit dissolved the district court's preliminary injunctions and remanded with directions to dismiss petitioners' claims. Pet. App. 2a, 32a. The court of appeals held that the naval base at Guantanamo Bay is not located in United States territory. *Id.* at 18a-19a. Based on its own precedents and on this Court's decision in *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2557-2558 (1993), the court held that the provisions of law on which petitioners relied—8 U.S.C. 1158(a) and 1253(h), and Article 33 of the United Nations Convention Relating to the Status of Refugees—do not have extraterritorial effect, and that petition-

ers' claims under those provisions were therefore "untenable." Pet. App. 20a-22a.

The court of appeals also rejected the individual Haitian and Cuban migrants' contention that the Due Process Clause of the Fifth Amendment afforded them a "right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven." Pet. App. 22a-23a. The court held that providing safe haven residency was a "gratuitous humanitarian act," *id.* at 23a, and it concluded that, "[b]y bringing the migrants to safe haven, the government has not created any protectable liberty or property interest against being wrongly repatriated and the migrants may not rest a claim of right of counsel and information on the due process clause," *id.* at 24a.

The court of appeals also held that the legal service organizations lacked a First Amendment right to obtain access to the migrants at Guantanamo. Pet. App. 28a-30a. While recognizing that lawyers have "a *narrow* First Amendment right to associate for the purpose of engaging in litigation as a form of political expression," the court stated that "[t]his right is predicated upon the existence of an *underlying legal claim* that may be asserted by the potential litigant." *Id.* at 28a (quoting *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1513 (11th Cir.) (per curiam), cert. denied, 502 U.S. 1122 (1992) (emphasis added by court below)). Having rejected the migrants' underlying statutory and constitutional arguments, the court rejected the legal organizations' First Amendment claims. Pet. App. 29a-30a. The court further noted that it "need not determine whether the government engaged in any viewpoint-based

discrimination in denying the Cuban Legal Organizations and HRC access while granting humanitarian organizations access." *Id.* at 29a. The court observed, however, that "[p]roviding humanitarian organizations access to the migrants does not, without more, create a First Amendment right to that access for those humanitarian organizations or for the Cuban Legal Organizations and HRC." *Ibid.*

4. On March 31, 1995, HRC and the Haitian migrants filed a petition for a writ of certiorari from the Eleventh Circuit's decision. They argued, *inter alia*, that the treatment of the Haitian migrants violated the Fifth Amendment and the Immigration and Nationality Act, and that the government had violated the First Amendment rights of HRC by denying it access to the Haitian migrants at Guantanamo. On May 31, 1995, the Cuban migrants and the Cuban legal service organizations (whose petition for rehearing in the court of appeals had by then been denied) filed a brief "fully support[ing] the grant of certiorari." No. 94-1611, Brief of Respondents, Cuban American Bar Ass'n, et al., at 3. They represented that they would "expeditiously [file] their own petition for writ of certiorari," *ibid.*, and they requested that this Court either defer ruling upon the HRC petition until that time or grant the HRC petition and their own petition and set the two cases for argument in tandem, *id.* at 4. On June 19, 1995, this Court denied the petition for certiorari. *Haitian Refugee Ctr., Inc.* v. *Christopher*, 115 S. Ct. 2578.

5. On May 2, 1995, the United States announced a new policy regarding the Cuban migrants. Under the new policy, the Cuban migrants at Guantanamo will continue to be considered for special humanitarian parole into the United States. Pet. App. 77a. The

Cuban government agreed to accept any Cuban migrants who wished to return, as well as persons found ineligible for admission into the United States. *Ibid.* All other Cubans at Guantanamo will be considered on a case-by-case basis for parole as "Special Guantanamo Entrants," bearing in mind the impact on state and local economies and the adequacy of sponsorship for the migrants in the United States. *Ibid.* Under the new policy, any Cuban migrants intercepted at sea will be taken to Cuba, where U.S. consular officers will assist them in applying for admission to the United States. *Id.* at 78a.

At this date, we are informed by the Defense Department that just under 11,000 Cuban migrants remain at Guantanamo.

ARGUMENT

Petitioners' request for vacatur of the Eleventh Circuit's decision is without merit. The case is not moot, and the possibility of mootness at some future date provides no basis for vacating the court of appeals' decision. Even if the case were to become moot prior to this Court's disposition of the petition, moreover, vacatur would be appropriate only if the court of appeals' decision presented issues warranting this Court's review. Petitioners can make no such showing. The court of appeals' decision is correct, presents no conflict with any decision of another court of appeals or of this Court, and (as the Court's previous denial of the Haitian intervenors' petition for certiorari from the same court of appeals decision indicates) does not warrant further review by this Court. The petition should therefore be denied.

1. a. There is no basis for petitioners' contention that the government's May 2, 1995, policy announcement "rendered this case moot." Pet. 10. ~~Approx-~~ Just under 11,000 ~~imately 14,000~~ Cuban migrants currently remain at Guantanamo. They are being considered for parole into the United States on a one-by-one basis. We are informed by the State Department that this process will not be complete until at least March 1996. Among those remaining at Guantanamo are at least two of the ten named class representatives, Nestor Rodriguez Labori and Jovani Miguel Fiffe Pino, who have not yet entered into the parole process. Petitioners are also free to attempt to add additional migrants as class representatives in order to increase the likelihood that class claims will continue to present a live case until this Court's disposition of the petition. Moreover, although the class of Cuban migrants was not formally certified by the district court, the relief granted by the district court pertained to all of the Cuban migrants at Guantanamo. In the court of appeals, petitioners sought to defend that class-wide relief. See also Pet. i (parties to the proceedings include individual plaintiffs "on behalf of themselves and all others similarly situated"). It is therefore appropriate in assessing the mootness of the case to treat the district court's order as *de facto* certifying the class action.

b. Even if the class claims of the Cuban migrants were to be deemed moot when the last named class representative is either paroled or repatriated, the claims of the petitioner legal service organizations would remain alive. In the court of appeals, those organizations submitted declarations evidencing that more than 11,000 of the Cuban migrants had expressly requested their representation. See No. 94-5138,

Brief of Plaintiffs-Appellees at 3, 52 n.27. The organizations claimed to represent all of those migrants and asserted a right to enter the military base at Guantanamo to meet with their "clients." Because petitioner legal service organizations have hundreds, if not thousands, of "clients" remaining at Guantanamo, their First Amendment claims of access are not moot. The possibility of mootness at some future date does not authorize vacatur of the court of appeals' decision.

2. Even if the case were to become moot prior to this Court's disposition of the petition, the petition should be denied. Where a case becomes moot during the pendency of a petition for a writ of certiorari, the judgment of the court of appeals should be vacated only if the case would otherwise have warranted this Court's review. Because the Eleventh Circuit's decision in this case raises no issue warranting this Court's plenary consideration, vacatur is not appropriate.

a. Most of the cases cited by petitioners in support of vacatur (Pet. 11-12) became moot either before the court of appeals rendered its judgment, or after this Court had granted the petition for a writ of certiorari.[3] A litigant has a *right* to appellate review

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[3] See *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 69-70 (1983) (per curiam) (moot while pending on remand before the court of appeals); *Preiser* v. *Newkirk*, 422 U.S. 395, 400-401 (1975) (moot after this Court granted certiorari); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (moot while on appeal; addressing the vacatur of the district court's order); *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam) (moot while on appeal); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994) (moot after this Court granted certiorari).

that should not be frustrated by the "vagaries of circumstance." *U.S. Bancorp. Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). This Court has accordingly explained that, "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below," *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam), so long as the mootness does not result from the voluntary act of the party seeking appellate review, see *Bonner Mall*, 115 S. Ct. at 391-393. Similar principles govern vacatur of a court of appeals decision when a case becomes moot after this Court has granted a petition for a writ of certiorari. See *ibid.*

That rationale for vacatur does not apply, however, where the case becomes moot *after* the court of appeals has entered final judgment and while a petition for a writ of certiorari is pending. A losing party has no right to Supreme Court review, which is discretionary and exercised circumspectly. See Sup. Ct. Rule 10.1. Mootness during the pendency of a certiorari petition provides a basis for vacatur only if the case would otherwise have warranted review by this Court. If the Court would have denied certiorari in any event, there is no unfairness in leaving the lower court's decision intact. See Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 953-958 (1980). Indeed, where the judgment would not otherwise have been reviewed by this Court, vacatur would disserve the public interest by eliminating a presumptively correct judicial precedent, cf. *Bonner Mall*, 115 S. Ct. at 392, 393, unfairly deprive the respondent of any collateral benefit that might inure from the judgment,

and confer upon the petitioner a windfall that it would not have secured if the controversy had remained live.

Accordingly, the long-standing position of the United States has been that, when a case becomes moot while a petition for a writ of certiorari is pending, the petition should be denied if the case would not have warranted review on the merits. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900); U.S. Br. as Amicus Curiae Supporting Respondents at 18 n.19, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam) (No. 92-1123); Reply Br. at 6, *Keough* v. *American Policyholders Ins. Co.*, cert. denied, 114 S. Ct. 682 (1994) (No. 93-320); U.S. Br. as Amicus Curiae Supporting Petitioner at 8 n.6, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, *supra* (No. 93-714). See also R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 724 & n.29 (7th ed. 1993) ("[T]he Court has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court will merely deny certiorari.") (footnote omitted).[4] Although this Court has never expressly

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[4] Petitioners erroneously contend (Pet. 16-17) that the Solicitor General has sought and received vacatur under like circumstances and that equity therefore supports vacatur here. As discussed above, it has been the government's consistent position that, where a case becomes moot during the pendency of a certiorari petition, the decision below should be vacated only if the case would otherwise have warranted this Court's review. The example cited by petitioners (Pet. 16-17) is entirely consistent with that position. The government filed a

endorsed that standard, the Court has simply denied certiorari in a number of those cases (including *Velsicol* itself) and thus decidedly has not automatically vacated a lower court decision whenever a case has become moot while a petition for certiorari was pending.[5] The approach described

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petition for certiorari from *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326 (2d Cir. 1992), challenging the Second Circuit's affirmance of a preliminary injunction. After the petition was filed, the district court entered a permanent injunction in the case. The government subsequently requested that the Second Circuit's judgment be vacated, and this Court vacated that judgment as moot. *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (*Sale II*). Because the government had urged the Court to grant plenary review of the Second Circuit's decision prior to the issuance of the permanent injunction, our subsequent request for vacatur (as well as the Court's order granting that relief) was fully consistent with the government's long-standing position that vacatur is appropriate in this context only if the decision below would have warranted review on certiorari. There is also no basis for petitioners' assertion (Pet. 17) that the government's unilateral actions mooted that case and caused this Court to vacate the Second Circuit's decision. The permanent injunction issued by the district court, not any "unilateral" action by the government, caused the issues regarding the preliminary injunction to become moot. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 394 (1981). Moreover, contrary to petitioners' suggestion, the district court's subsequent vacatur of its permanent injunction in that case was fully consistent with—indeed, expressly contemplated by—this Court's decision in *Bonner Mall*. See 115 S. Ct. at 393.

[5] For example, in *Keough* v. *American Policyholders Ins. Co.*, *supra*, the Solicitor General filed a petition for a writ of certiorari. While the petition was pending, both sides filed briefs with the Court agreeing that the case had become moot due to the actions of the respondent. The respondent argued that the petition should be denied. The government contended

above, moreover, is consistent with this Court's recognition that "[i]t is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate * * * equitable entitlement to the extraordinary remedy of vacatur." *Bonner Mall*, 115 S. Ct. at 392.[6]

b. The Eleventh Circuit's decision in this case presents no issues warranting this Court's review. Indeed, the claims raised by petitioners in this Court (see Pet. 18-26) closely resemble those of the Haitian intervenors in their earlier certiorari petition, which the Court has already denied, see note 1, *supra*. Vacatur is therefore inappropriate.[7]

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that the decision below should be vacated because the case, had it remained live, would have warranted this Court's review. Reply Br. at 5-6 (No. 93-320). This Court did not vacate the decision below, but instead denied certiorari and left the lower court decision intact.

[6] As noted above, see page 9, *supra*, petitioners have claimed throughout this litigation to represent (and have defended the district court's order awarding relief on behalf of) thousands of Cuban migrants at Guantanamo, and they remain free to add additional migrants as class representatives if the last of the current individual named plaintiffs is paroled into the United States or repatriated. Moreover, the parole of Cuban migrants (including any of the named plaintiffs) into the United States reflects a volitional act on their part; migrants at Guantanamo are not brought to the United States against their will. There is consequently no basis for petitioners' repeated assertions (see Pet. i, 10, 12, 14, 16) that the mootness of the case—if and when it occurs—will be the result of "unilateral" actions by the government. See *Bonner Mall*, 115 S. Ct. at 392 (parties' "equivalent responsibility for the mootness" ordinarily "constitutes a failure of equity" that makes vacatur inappropriate).

[7] Because the Haitian parties' own certiorari petition seeking review of the judgment of the court of appeals has already

i. The primary issue before the court of appeals was whether alien migrants at Guantanamo had a right to consult with a lawyer before they were repatriated. See Pet. App. 20a-22a. Petitioners based that asserted right to counsel upon Section 243(h) of the Immigration and Nationality Act (INA), 8 U.S.C. 1253(h), and Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, which, they argued, afforded the Cuban migrants at Guantanamo a right not to be repatriated. As the Eleventh Circuit recognized (Pet. App. 21a), petitioners' argument was directly contrary to *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (*Sale I*), in which this Court squarely held that neither Section 243(h) nor Article 33 places any restriction upon the involuntary repatriation of migrants outside of the United States. See 113 S. Ct. at 2559-2567. The court of appeals correctly rejected petitioners' argument (Pet. 24 n.15) that *Sale I* was limited to migrants on the high seas. Pet. App. 22a. This Court's holding turned on the fact that the migrants in that case were located outside the borders of the United States, and the case was brought on behalf of migrants at Guantanamo as well as those interdicted on the high seas. See 113 S. Ct. at 2554-2555, 2556.[8] The Court expressly agreed with

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been denied, the judgment is final and res judicata as to them. Petitioners do not in any event have standing to seek review or vacatur of the judgment below insofar as it applies to the Haitian parties.

[8] For example, in holding that Section 243(h) of the INA did not extend to the migrants on Coast Guard cutters and at Guantanamo, this Court explained that Part V of the INA, which contains Section 243(h), does not apply "outside the United States" and is "limited to strictly domestic pro-

Judge Edwards' conclusion in *Haitian Refugee Ctr.* v. *Gracey*, 809 F.2d 794, 840 (D.C. Cir. 1987), that Article 33 "was not intended to govern parties' conduct outside of their national borders." *Sale I*, 113 S. Ct. at 2564.[9]

ii. Petitioners contend (Pet. 24-25) that, by providing "safe haven" for the Cuban migrants, the

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cedures." *Sale I*, 113 S. Ct. at 2560. See also *ibid.* (relying on "presumption that Acts of Congress do not ordinarily apply outside our borders"); *id.* at 2562 (Section 243(h) applies "in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States"). This Court likewise rejected the contention that Article 33 applies to "actions taken by a country outside its own borders." *Id.* at 2562-2563. See also *id.* at 2563 (text of Article 33.2 "limited to those already in the country" because Article 33.1 "obligated the signatory state only with respect to aliens within its territory"); *id.* at 2563-2564 (phrase "expel or return ('refouler')" limits Article 33.1 to aliens "already present in the host country" or "at a border" and thus "already within the territory"); *id.* at 2567 (negotiating history shows "general consensus" that right of non-refoulment applies "only to aliens physically present in the host country").

[9] Petitioners' reliance (Pet. 23) on *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), is therefore misplaced. *Wong Yang Sung* addressed the rights of aliens subject to deportation hearings in the United States. It did not extend due process or other rights to aliens outside this country. Indeed, although the INA confers procedural rights on excludable aliens who have reached a port of entry, such individuals have no constitutional due process rights in connection with their exclusion proceedings. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950). An alien who has not reached this country's borders or a port of entry cannot have a greater claim to due process than an "excludable alien" who has physically reached our shores.

government conferred upon them a constitutionally protected liberty or property interest in remaining at Guantanamo that could not be taken away without due process of law (including the right to counsel). The court of appeals correctly rejected that argument. Pet. App. 23a-24a. This Court has similarly rejected the contention that the Fifth Amendment applies to aliens outside the United States. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). Even if the Fifth Amendment applied to migrants located outside the United States, moreover, providing safe haven to such migrants creates no protected property or liberty interests that could trigger the applicability of the Due Process Clause. And even if the Due Process Clause did apply in that setting, that Clause would not give rise to a right to the assistance of counsel in connection with immigration determinations at a military base outside the United States. Cf. *Wolff* v. *McDonnell*, 418 U.S. 539, 570 (1974); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-326 (1985).

Petitioners also rely (Pet. 23-24) upon a vacated district court ruling from the Eastern District of New York[10] and on the Second Circuit's decision in *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992), vacated as moot *sub nom. Sale*

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[10] *Haitian Ctrs. Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (1993), vacated by Stipulated Order Approving Class Action Settlement Agreement (E.D.N.Y. Feb. 22, 1994). That vacated district court judgment was premised on the erroneous view that the Due Process Clause applied on Guantanamo, ignoring that Guantanamo is not part of United States territory and that this Court has held that the Due Process Clause does not apply to aliens outside the United States.

v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (*Sale II*). As petitioners acknowledge (Pet. 24), however, the Second Circuit's ruling was vacated by this Court as moot, and it therefore has no precedential effect. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975). The Second Circuit's analysis, moreover, has been substantially undermined by this Court's intervening decision in *Sale I*. In finding a due process right for "screened-in" migrants (*i.e.*, those who had been determined to have a colorable claim of refugee status), the Second Circuit relied on its view that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, and Section 243(h) of the INA, 8 U.S.C. 1253(h), applied to alien migrants outside of the United States. See *McNary*, 969 F.2d at 1344-1345, 1346 n.16. This Court subsequently held in *Sale I*, however, that Section 243(h) and Article 33 do not apply outside the United States. See 113 S. Ct. at 2559-2567; pages 14-16, *supra*.

In any event, even the Second Circuit agreed that the Due Process Clause was not triggered by the act of "transport[ing] * * * interdicted [migrants] to Guantanamo Bay." 969 F.2d at 1345. Under the Second Circuit's analysis, it was the act of "screening in" a migrant (*i.e.*, finding a colorable claim of refugee status) that rendered the Due Process Clause potentially applicable. *Ibid.* No refugee determination or screening has taken place with regard to the migrants in the present case. See Pet. App. 23a-24a (distinguishing *McNary* on the ground that transportation to safe haven is not the equivalent of refugee screening). The fact that petitioners have

been permitted to stay in "safe haven" does not create any enforceable rights or effect any legally significant change in status; it merely reflects a discretionary, humanitarian policy being carried out by the United States. See R.E. 257, 293-294. There is no legal entitlement to be brought to "safe haven" at Guantanamo; there is no legal entitlement to remain there; and the allowance of safe haven certainly confers no enforceable right to be brought to and paroled into the United States.

iii. The court of appeals correctly held (Pet. App. 18a-20a) that the naval base at Guantanamo is located on the sovereign territory of Cuba, not on United States territory. As the court of appeals recognized (*id.* at 3a n.1, 19a), the naval base occupies that foreign land pursuant to a lease agreement with Cuba. The lease grants the United States the right to use and occupy Guantanamo and adjacent water areas. In the agreement, however, the parties explicitly recognize "the continuance of the ultimate sovereignty of the Republic of Cuba over those land and water areas." Agreement between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Art. II (Feb. 23, 1903); 6 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1113-1114 (1971). The court of appeals correctly concluded that the authority exercised by the United States at Guantanamo derives from that agreement, not from any claim of sovereignty.[11]

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[11] The court of appeals also correctly recognized that the military installations in Panama are located on the sovereign

iv. Contrary to petitioners' hyperbole, the court of appeals did not hold that Guantanamo is a "rights-free" zone (Pet. 24), where the United States government could freely punish United States citizens for engaging in religious worship (Pet. 18). Rather, the court of appeals held that alien migrants outside the United States have no Fifth Amendment due process rights, and that neither Article 33 nor the INA entitles such aliens to meet with counsel before being repatriated.[12] Petitioners' contention that the Eleventh Circuit's decision contains "overbroad dicta" (Pet. 25) provides no basis for this Court's plenary review, and thus no basis for vacatur of the court of appeals' judgment.

v. Petitioners argue (Pet. 18-22) that the government impermissibly prevented the legal service organizations from exercising their asserted First Amendment rights to associate with Cuban migrants. The court of appeals correctly held that the First

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territory of Panama. The Panama Canal Treaty of 1977, 33 U.S.T. 39, recognized the Republic of Panama's sovereignty over and the application of Panamanian law in the area that was formerly the Canal Zone. The Treaty provides that Panama is the "territorial sovereign" over the land used for the military installations (Art. III, ¶1; 33 U.S.T. 50), and further states that "the law of the Republic of Panama shall apply" in such areas (Art. IX, ¶1; 33 U.S.T. 61).

[12] Petitioners contend (Pet. 22) that the court of appeals' decision permits officials at Guantanamo "deliberately to terrorize" and "starve" alien migrants detained outside of the United States. That emphatically is not the case. The proscriptions in the Uniform Code of Military Justice, 10 U.S.C. 877 *et seq.*, as well as provisions of the U.S. criminal laws made applicable by 18 U.S.C. 7, protect against abuse by military and civilian personnel who assist in the care of the migrants at Guantanamo.

Amendment does not confer upon lawyers any special right of access to aliens at a military base abroad.

"Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Assuming, *arguendo*, that under some circumstances access to U.S. military bases abroad might be subject to some form of First Amendment forum analysis, the naval base at Guantanamo is assuredly not a public forum. The Executive Order that established the naval base, and the regulations that govern its use, place stringent restrictions on civilian entry. See Exec. Order No. 8749, 3 C.F.R. 209 (1941 Supp.); 32 C.F.R. Pt. 761. Apart from the rare instance where a portion of a military base is freely open to civilian traffic (see *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam)), military bases are nonpublic fora, even where they have been opened to the public for special purposes. See *United States* v. *Albertini*, 472 U.S. 675 (1985); *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976); *Brown* v. *Palmer*, 944 F.2d 732, 735-739 (10th Cir. 1991) (en banc).

Even in the domestic context, the government may restrict speech in a nonpublic forum based upon "subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806; see also *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The government's actions here fully satisfied that standard. Petitioner legal service or-

ganizations were granted the same level of access to Guantanamo as other similarly situated groups. Under Department of Defense policy, individuals or organizations may obtain limited access to migrants on Guantanamo (*i.e.*, visits of one or two days) if such access would further the needs of the migrants and would not impair the military in carrying out its responsibilities. R.E. 348-350. The policy provides that "all visitors are subject to the same procedures and restrictions" regardless of viewpoint. R.E. 352. The government's policy even establishes a preference for "humanitarian organizations, human and legal rights organizations and similar organizations serving the immediate needs of the migrant community." R.E. 348. Thus, the government provided lawyers and legal rights groups access to the Base under a reasonable, viewpoint-neutral policy.

There is no basis for petitioners' claim (Pet. 18-21) of impermissible viewpoint discrimination. Petitioners premised that claim on the fact that certain nongovernmental organizations, such as the World Relief Organization and Amnesty International, were permitted greater access to Guantanamo. Amnesty International was allowed such access for the purpose of facilitating the federal government's viewpoint-neutral goal of demonstrating to the public that its operations on Guantanamo satisfy the standards of an independent, well-respected human rights organization. See Dep. of Stewart Moneymaker 23 (Nov. 22, 1994); see generally *id.* at 19-31. The World Relief Organization was permitted to maintain a long-term presence on Guantanamo because of its ability to assist the government in caring for the migrants, as demonstrated by its experience and expertise in performing similar tasks worldwide. See R.E. 350;

Dep. of Ronald W. Zaperach 53-58 (Nov. 22, 1994); Moneymaker Dep. 23-25. The government's decision to accept their assistance does not constitute viewpoint discrimination. See *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134-135 (1977); *Thornburgh* v. *Abbott*, 490 U.S. 401, 415-416 & n.13 (1989). Petitioners also asserted that it was viewpoint discrimination to permit INS and other government officials to communicate with the migrants while denying private attorneys a right of access. The government's exercise of its own functions, however, cannot create an obligation to provide third parties with a right under the United States Constitution to obtain access to a military base in a foreign country.[13]

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[13] Petitioners rely (Pet. 20-21) upon an alleged conflict with the Eleventh Circuit's prior decision in *Jean* v. *Nelson*, 727 F.2d 957 (1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985). An intra-circuit conflict would not warrant this Court's review. Petitioners raised this alleged conflict before the Eleventh Circuit in their petition for rehearing with suggestion of rehearing en banc, which the court denied. In any event, *Jean* (which involved aliens detained within the United States) is consistent with the decision in this case. The Eleventh Circuit in *Jean* did not resolve the First Amendment issue presented there, but instead remanded the matter so that the district court could address the issue in the first instance. See 727 F.2d at 983. In the course of its opinion, the court of appeals noted that the First Amendment provides a general right to "inform individuals of their rights." *Ibid.* The Eleventh Circuit in the present case expressly recognized that same general right. Pet. App. 28a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.